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## THE NEW YORK CODE OF PROCEDURE.

On and after the first day of July, 1848, the only system of pleading and practice, the only forms of remedial law, or what, after French usage, is called procedure, in force in the state of New York, will be a system of equity procedure. Such, in a few words, is the general *positive* result of late changes. Another result, of a negative kind, is, that on the same day, that other system of remedial law, so well known, as the system of pleadings and practice at common law, ceases to exist in that state. And on the same day, the court of chancery of New York, some of the powers of which had been kept alive, by the constitution, for the purpose of hearing and disposing of pending suits, comes to an absolute and final close, with all its imposing array of officers, chancellor, vice-chancellors, examiners, and masters. The only trace left in the constitution of November, 1846, of the submerged world of chancery, the only peak above the waters, is the word "equity," occurring four or five times in article six.

That article establishes a new judiciary, the great features of which, are a "court of appeals," a "supreme court," of thirty-two justices, a "county court," of one judge in each county, and "justices of the peace" in each town. In New York city there are a "superior court" and "court of common

pleas," also. The supreme court has its "general terms and special terms," its "circuits" and "oyer and terminer." It has "general jurisdiction in law and equity," (§ 3.) "The testimony in equity cases is to be taken, in like manner, as in cases at law" (§ 10.) Some of the courts are "of record," others not of record. In short, in terms and phraseology, in the arrangement of all its details, the system of courts organized, by the constitution, may be fairly called a common law system. The very term, "county court," carries us back as far as the legal antiquary can go into the remotest ages of English law.

If any one think he finds a certain incongruity in these statements, and suspects us of a careless use of adjectives and nouns, in thus announcing, in one breath, the extinction of the court of chancery, and the virtual supremacy of equity procedure, the organization of nothing but common law courts, and the abolition of common law pleadings and practice, he must examine, with us, some of the momentous acts of legislation, touching the remedial law which have been passed in New York, since the adoption of the new constitution, and whatever incongruity there may anywhere be, he will not find it confined to our statements.

When the section, conferring on the supreme court general jurisdiction in "law and equity," was under discussion in the constitutional convention, a distinguished member from New York city, Mr. O'Connor, urged the omission of the word "equity" altogether, and strenuously argued that the distinction between law and equity should not be allowed to exist, by even appearing to exist, in the constitution, at all. He, at the same time, took occasion to express, very strongly, his opinion, as to the defects of the present system of procedure, and broached the idea, "that the forms of pleading, used in chancery, reduced and cut down to the extent they might be, were the true forms by which civil justice might be administered, in all cases, in one court, and by a uniform mode of practice."[1] The effect of these remarks, enforced and illustrated with Mr. O'Connor's characteristic and professional sharpness and point, was amusing. One gentleman seemed disposed, by a rapid movement and skilful cross-examination, to

[1] Convention Debates, Atlas edition, p. 560.

"cut off" the daring speaker on the spot. Mr. Attorney-General Jordan was not quite sure whether he had heard the gentleman aright; if he did, he "received the doctrines with apprehension and alarm."[1] The section, as it was reported, was adopted, notwithstanding the argument that it might be construed, as contemplating and requiring two modes of procedure, in one tribunal.

Early in the session of the convention, propositions for the abolition, not of the courts of common law, but of the court of chancery, and for the revision of the law, for the reform of the law, for the consolidation and codification of the law, were made; and they were renewed in various shapes, by different members, during the session. We have the result of these efforts in two important provisions of the constitution. The most momentous, certainly, is the provision for the appointment, by the legislature, of three commissioners, "to reduce into a written and systematic code, the whole body of the law of this state," and to "specify such alterations and amendments therein, as they shall deem proper." The commissioners were appointed in April, 1847. But of this commission we do not propose to speak, and refer to it only as a part of the same great movement. Of its labors nothing has been published; we have only two letters of resignation, one from Chancellor Walworth, and one from Mr. Collier. But we cannot, in passing, refrain from expressing our respect and admiration for the courage of the men who have consented to undertake the codification of the whole body of the law of a great state, the future Tribonians of a new "*totum corpus juris.*" The first meeting of the commissioners must have been a scene of high-wrought interest. We say the first; perhaps, rather, the second or third meeting. We are told, St. Peter's church, enormous as it is, does not, at first sight, strike the beholder with that heavy sense of immensity, which comes over him after repeated visits. Unaccustomed to such masses of human workmanship, he forgets to refer them to the standards by which human works are to be measured, and it is not until he looks round at ordinary objects, and looks home at his own littleness, that the extraordinary vastness becomes impressed

[1] Convention Debates, Atlas edition, p. 372.

upon his mind. Imagine, then, the able commissioners of the New York code (high as they doubtless are in mental stature) standing in the full presence of the awful structure of our jurisprudence, its dome and cross piercing the serene heaven of justice above, its foundations lying deep, below, in the experience of the past!

The twenty-fourth section of article six of the constitution, provides for the appointment, by the legislature, of three commissioners, and makes it their duty "to revise, reform, simplify and abridge the rules and practice, pleadings, forms, and proceedings of the courts of record of this state, and to report thereon to the legislature."

An act of April, 1847, purporting to be in pursuance of this provision, appointed the commissioners, and made it their duty "to provide for the abolition of the present forms of actions and pleadings, in cases at common law, for a uniform course of proceedings in all cases, whether of legal or equitable cognizance, and for the abandonment of all Latin and other foreign tongues, so far as the same shall by them be deemed practicable, and of any form and proceeding not necessary to ascertain, or preserve the rights of the parties."

The commissioners, Messrs. Arphaxad Loomis, David Graham, and David Dudley Field, made their first report in February last. They submitted an act, which, after some amendment, was passed April 12, 1848. The preamble recites, that "it is expedient that the present forms of actions and pleadings, in cases at common law, should be abolished, that the distinction between legal and equitable remedies should no longer continue, and that an uniform course of proceedings, in all cases, should be established."

§ 62. "The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished, and there shall be, in this state, hereafter, but one form of action, for the enforcement, or protection of private rights, and the redress of private wrongs, which shall be denominated a civil action."

§ 118. "All the forms of pleading heretofore existing are abolished; and hereafter the forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings is to be determined, shall be those which are prescribed by this act."

We do not stop to inquire whether the terms "revise, reform, abridge, &c." in the constitution, are broad enough to support the legislative order for "the abolition" of the present forms; nor shall we raise the point, here, that authority to abolish all actions at law cannot, in strictness, be construed into an authority to abolish suits in equity. But, whatever question there may be, as to the powers which the constitution intended should be given by the legislature to the commission, or as to the precise powers actually given, there can, it is presumed, be no doubt that the legislature, from the very nature of its functions, possesses general control over the entire subject of pleadings and practice, and may, therefore, by adopting, ratify any action of the commissioners in the premises, whether contemplated by the original act or not.

One half, or rather the first part of their twofold duty, having been thus summarily disposed of, by the commissioners, in two sections, they devote the rest of the act to a more difficult task than abolishing old forms, that of providing new and better ones. The act consists of 391 sections in all, numbered continuously to the end, and as published by the legislature, with the reviser's elaborate notes, introductory and explanatory, makes a volume of 260 pages. It is divided into two parts, to which are prefixed certain general definitions and divisions of actions. But these parts are not the whole, they are only the first two of the series of laws, which the commissioners call a "code of procedure." In addition to the regulation of civil actions, to which the present act is confined, future parts will embrace, criminal procedure, new provisions respecting the jurisdiction of courts, the rules of evidence, all proceedings not actions, classed by § 3 as special; in short, the remainder of "the law of the state concerning remedies in the courts of justice."

Part first, as adopted, contains an enumeration of all the courts of the state, a sort of reënactment of the sections of the constitution establishing courts, and also of the present laws, regulating their jurisdiction. Part second treats of civil actions, and in twelve titles regulates their form, the time of commencing them, the parties, the place of trial, the manner of commencing them, the pleadings, arrest, and bail, and other proceedings, termed provisional remedies; trial and judgment,

execution, costs, appeals, and certain miscellaneous proceedings, such as motions and orders, the examinations of witnesses and of parties.

Before attempting a sketch of the new system of pleading, we shall briefly state some of the most important of the many alterations of the existing law, mainly affecting practice, but by no means confined to that subject, nor yet falling strictly under the head of pleading, which occur in every part of the code.

It enacts that the civil remedy for a wrong shall, in no case, be merged in the criminal (§ 7); it abolishes actions on judgments (§ 64); it makes the lapse of twenty years an absolute bar to an action on a sealed instrument, and not a mere defence, by way of presumption of payment (§ 96); it makes a written acknowledgment subscribed by the party to be charged, necessary to revive a debt, barred by the statute of limitations (§ 90); it extends exemption from arrest and imprisonment to cases of tort, except where the defendant is a non-resident, or is about to remove from the state (§§ 154, 156); it requires the plaintiff to give security for the defendant's costs and damages, on applying for "an order of arrest," which is the substitute for the *capias* (§ 157); it allows a deposit of money instead of bail (§ 172); it provides for one undertaking of bail, instead of bail alone, and bail to the sheriff (§ 162); it allows arrest at any time during the action, before judgment (§ 158); it permits the defendant, in replevin, to retain the property, pending the suit, on giving security (§ 186); abolishes the writ of injunction, substituting proceedings, similar in effect, by order (§ 191); and provides that no suit shall abate, by the death, marriage, or other disability of a party (§ 101.)

The provisions of the code, relating to "trial by referees," are striking, and may lead to important results (§ 225.) *Any* of the issues in an action, may be referred, by consent, *issues of law*, as well as issues of fact. In other words, parties are at liberty to select from the community at large, the judges of their controversies, and every citizen, layman, and lawyer, becomes a kind of auxiliary judge, an assessor to the bench.

The code also abolishes all existing laws relating to fees, and restricting and regulating agreements between attorney, or counsel and client, as to compensation, but allows the successful party certain specified sums, by way of indemnity, from his opponent (§ 258.)

Not only may parties to an action choose their judges, but parties to any question in difference may, under the code of procedure, submit a case, containing the facts, and accompanied by affidavit of the good faith of the proceeding, upon which the court is authorized to hear and determine the matter, and judgment (without costs) is to be entered up as in actions (§§ 325–7.) And provision is made for the compromise of suits, by allowing the defendant to make a written offer, at any time before judgment, to consent to a judgment for a specified sum. If the plaintiff do not accept the offer, and fail to recover more than the sum specified, he is liable for all the costs incurred by the defendant after making the offer. If he accept, he may have judgment entered up by the clerk (§ 338.)

No part of the code is more calculated to startle those of a staid turn of mind, than the provisions relating to testimony. The result of these provisions seems to be, that all incompetency of witnesses is done away, except in one instance. A party may not put *himself* on the stand. And even as thus stated, the rule requires modification. All proceedings by action to obtain discovery, being abolished, the code provides that any party may be called, as a witness, to the stand, by the adverse party, and examined, in the *same manner*, and under the same rules, as any other witness. A party, however, who has been thus called and examined, is allowed to testify, *on his own behalf*, "to any matter pertinent to the issue" (§§ 343, 344, 349.) Incapacity, *from interest*, is expressly abolished, with the qualification mentioned. As to this provision, however, it may quiet the minds of some, to know that it is but a tardy imitation of the reform introduced in England five years ago, by Lord Denman.

The system of pleading presented in the code is short and simple. But do the commissioners think it will always remain thus short and simple, and, like the prince of codifiers, Justinian, who, on publishing the Digest, issued a constitution forbidding all note and comment for all time to come, imagine that the ingenuity of human wit, the complexity of human affairs, and the certain accretions which the wave of time alone is sure to bring with it, will not add to the bulk and mar somewhat the symmetry of their plan? If they share Justinian's delusion,

they must look for his fate. He came out the next year after his Digest was issued with comments of his own! But the New York commissioners have given ample proof of a spirit of wiser and more reasonable reform. They have not been in hot haste to make "all things new," but rather disposed to make new applications of old forms and modes. In every nation in which there is a true political life, institutions are not a mere structure of men's hands, but a growth of time. The course of events makes changes necessary. But the wise reformer modifies rather than abolishes. The old may thus become mixed with the new. Old forms of the past may cramp somewhat the business of the present; a sort of incongruity may result; but it is such incongruity as must always exist in life and affairs. The theorist will find perfect symmetry only in theories, and the people whose legislators are at liberty to pull down and build up at will are the subjects of despots.

Only one form of action being allowed by the code, it provides but one mode of commencing it — by service of a summons, which is a notice of the action subscribed by the plaintiff or his attorney, and requires the defendant to serve a copy of his answer on the plaintiff within twenty days.

The parties are termed plaintiffs and defendants. "All persons having an interest in the subject of the action and in obtaining the relief demanded, may be joined as plaintiffs (§ 97); and any person may be made a party defendant who has any interest adverse to the plaintiff.

The only pleadings are the complaint by the plaintiff; the defendant's answer or demurrer to the complaint, and plaintiff's replication to the answer. No demurrer is allowed to the plaintiff. An issue is effected by either an answer, demurrer, or replication. The general rule is laid down that every allegation not controverted by the opposite party, by a denial either of fact or of knowledge of the fact, shall be taken as admitted as to the fact, but not as to the legal effect. The pleading, therefore, need not go farther than the answer or demurrer. It cannot go farther than the replication. The replication is allowed, not so much for the advantage of the plaintiff in alleging new matter, as for the advantage of the defendant, in having the allegations of his answer distinctly admitted or denied. This rule of equity pleading, which makes the allega-

tions end with the replication, is, we think, a wise one. Logically, there *may* be no end to counter-statements of new facts, and the practical question is, whether the substantial facts are not as likely to be brought out in three as in seven allegations, and whether it is not as well to stop at the replication as to allow an imaginary surrebutter which is hardly ever reached.

The complaint (which is not required to be filed in the first instance, but a copy of which must be served on the defendant with the summons,) must contain the title of the cause, name of the court, and name of the county (by way of venue) in which trial is desired, names of parties, "a statement of the facts constituting the cause of action," "a demand of the relief to which the plaintiff supposes himself entitled," and if a money demand, a statement of the amount (§ 120.) The provisions of this section are very similar to those of the French Code de Procedure Civile respecting the *exploit d' ajournement*, corresponding to the complaint, which must contain dates, names, and occupation of parties, "object of demand, and summary *expose* of the grounds," and the name of the tribunal (*Code* § 61.)

The answer of the defendant and the plaintiff's replication to the answer, may contain a denial of any fact or of knowledge of any fact alleged in the pleading answered, or allegations of new matter. All pleadings, except the demurrer, must be verified by the party, *his agent or attorney* (§ 133.)

Allegations are to be liberally construed, with a view to substantial justice, not *fortius contra proferentem*. Irrelevant or redundant matter may be struck out on motion (§§ 136, 137.) These provisions, with the general one that allegations must be "in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended, are absolutely the only important rules of pleading in the code (§§ 120, 131.) No such thing as forms of pleading is recognized, and the most liberal statute of *jeofails* that ever was enacted is contained in §§ 145, 149. No variance is to be deemed material unless the opposite party make affidavit that he has been misled. And the court may, *at any time*, amend any pleading by inserting, striking out, and "conforming the pleading to the facts proved"!

There are no set phrases of assertion and denial, like the

propositions *affirmans et negans* of the schools of logic in the middle ages, required to produce an issue. Issues which are of law or of fact (§ 203) arise, the former on a demurrer or an allegation not controverted. Every allegation controverted and every *new* allegation in a replication is an issue of fact. All issues are *tried;* those of law by argument, those of fact by testimony; before a single judge, in the first instance, in both cases. Trial is either by court, by jury, or by referees. By consent *all* issues may be tried by referees (§ 225.) Reference may be *ordered* in cases of account, and of questions of fact other than those arising on the pleadings. The constitutional right of trial by jury in cases heretofore accustomed remains, of course, untouched. The commissioners inform us that § 208, which provides that "whenever, in an action for the recovery of money only, or of specific real or personal property, there shall be an issue of fact, it must be tried by a jury," is intended to extend the right to other cases. What new issues are included under these general terms is not very clear. Would an action for common foreclosure of a mortgage be triable by jury, under the first clause, being for the recovery of money only; or an action for strict foreclosure, being for specific real property under the second?

All issues of law, and all issues of fact, other than those triable by jury, or referees, are to be tried by the court. And *all* issues may be tried by the court, by consent (§ 221.)

The verdict of the jury may be general or special, in actions triable, of right, by a jury. In all other cases the verdict must be special, if the court so direct, or it may direct a special verdict, on particular questions of fact, in addition to the general verdict. Where there are both, the special is to control the general verdict (§§ 216, 217.) Judgment may determine the ultimate rights of parties, and may be given for or against plaintiffs, and for or against defendants, in the same action (§ 230.)

Such, briefly, is the system presented in the first two parts of the New York code of procedure.

Here we have, on the one hand, common law courts, with oral proceedings and trial by jury; on the other hand, civil law, or equity pleading, without distinct forms of action, without strict forms, or any of those rigid rules for the production of

"single, certain, material" issues, deemed essential to the efficiency of trial by jury. Is the incongruity fatal? Can the two systems work together? This is the great point into which all others resolve themselves. This, substantially, is the main question to which the most elaborate of the commissioners' able notes are directed.

The difficulties are, the want of distinct forms, and the want of strict formulæ and rules. These, it is said, are necessary to produce plain issues. And plain issues, on the pleadings, are necessary to enable laymen to comprehend. Now it as well to inquire, as matter of experience, how much use juries actually do make of the written pleadings. Are counsel apt to quote largely from them for the benefit of the jury? Would the jury understand if they did? Would not the experiment be apt to result somewhat like the triumphant appeal of one learned advocate, who is reported to have put it to the jurors, as men of common sense, whether his client could possibly have committed a battery with all the implements mentioned in the declaration, with swords, staves, ropes, hands, and feet, all at once?

Whatever good, then, the rules and forms of pleadings may be calculated to do, we agree with the commissioners, in the opinion, that, as a matter of fact, they do the jury no good, because they are actually not used.

The commissioners go further. They complain that these forms can do no good, because unintelligible, and because they are so vague and formal, that for the sake of a technical, logical issue, they shut out the real matter of a case. They enlarge upon the importance of pleadings which shall bring the real issues clearly before the jury.

Admitting these defects of the present forms, may we not go a step further still? Are any pleadings calculated to be of much use to a jury, in forming their verdict, which must be made up on the spot, after hearing the case? We are told that, at a certain ancient period of the law, the pleadings took place, orally, before the court and jury. Is it not, must it not always be so? The real pleadings are, the speeches of opposing counsel, wherein facts are really stated and whereupon suit is brought, of the witnesses who are to prove the facts.

One of the uses of pleadings is, to preserve records of ac-

tions. The form of common law pleadings, in the present tense, seems to indicate that this was really their original purpose, being minutes made at the time of the trial. If this were the only object of the pleadings, it might be effected in the same way still. But are not their two great objects, in fact, first to inform the opposite party of the grounds of action and of defence ; second, to inform the judge of the facts alleged, in order that he may see whether they afford a legal ground of complaint, sufficient to be laid before a jury ? If these be the objects of a system of allegations, it appears to us that some such general rules as those of the New York code, are all that are required to effect them.

The first great argument then, seems to be that, as a matter of fact, the pleadings, under the present system, are not referred to, are not used by the jury. In the next place (as the commissioners contend) under the formal and simple issues at common law there lie concealed, as it were, as many and as various, and difficult issues, as those presented by pleadings in equity. How many and complex, for instance, are the real issues involved in a defence, on the ground of fraud. Such complex questions are not simplified to the jury by the parties uttering the bald phrases of " guilty," and " not guilty," " *assumpsit*," and " *non assumpsit*." The chief argument which occurs to us in favor of the present system of pleading at common law is, that the rules of evidence turn very much on the forms and rules of pleading. Evidence, as a system, is the creation of comparatively late times, built up long after the common law was old, and with a direct reference to its principles. The forms of action and pleading have thus become the key-note, as it were, to the rules of evidence applicable to each case. The answer to this argument seems to be that unless the common law forms can stand by their own strength, it makes rather against the present rules of evidence itself, than for those forms. This consideration has not escaped the attention of the commissioners, who propose, as we have seen, to modify the rules of evidence, in a future part of the code.

If these arguments prove fallacious, if equity pleading prove incompatible with oral proceedings and trial by jury, there can be no doubt which must yield. The people of New York have abolished the court of chancery. They have required testi-

mony to be taken in equity, orally, as at law. But they have *not* abolished trial by jury, and we trust they never will. Whatever may be thought of it, as a means of eliciting truth, and, without claiming for it any mystical virtue, we believe it is equal, or superior, to any other; trial by jury is, no doubt, one of the great elements, the great characteristic of a true republic. It is the school of the freeman, in which he learns to weigh facts, to balance arguments, and gets that habit of deliberation, without which the right to vote is an injury to himself and an injury to his fellows; it is the school, in short, where the man is educated into the citizen. Moreover, through trial by jury, every citizen becomes a member of the court, a judge, and the administrator of justice is saved from that isolation from the people, which is the first step towards secret proceedings and arbitrary tribunals, like those which continental Europe is fast exchanging for public trial by jury. This is the true popular element of the judiciary; not low salaries, nor elective judges.

Whatever view be taken of this great question, there is certainly one very mistaken notion which ought to be corrected, because, with many, it carries with it the weight of more than an argument, of a prejudice. Among the other fine and many true things said of trial by jury, and our Saxon ancestors, it is often asserted that it is of exclusively English origin. One gentleman asserted, at Albany, in the constitutional convention, that trial by jury was "unknown to the ancient Romans." Now there is no doubt that it is an original English institution. But there is as little, that it was an original Roman one, too. We are inclined to think that, in some shape, it is found among every people, having the true instinct of liberty. In one shape, it is the Athenian *demos* in the Agora, casting the vote of guilty or not guilty. It is the Roman people in the forum. It is the Saxon freeholders in county court, "which," saith Coke, "is no court of record," but "the suitors are the judges thereof." But Rome had something far nearer trial by jury than all this. We translate *judex*, judge, but Cicero's forensic appeals were, in fact, jury speeches, and the *judices* (*judices jurati*, he calls them, in one place) were judges, not of law, but of fact, — were jurors. There were annual jury lists at Rome (*decuriæ judicum*) as at New York. And jury duty

was compulsory.[1] The *jus prosequendi injudicio* was literally the right of trial by jury. In short, if a sharp and clear separation of law from fact, if reference of the former to a law magistrate (the prætor), of the latter to one or more citizens who were selected by lot, and were sworn to act as *judices*, or *recuperatores*, if the production and oral examination of witnesses before these citizens, by whom the testimony was received, to whom public arguments were addressed, and whose decision was final as to facts, — if these make trial by jury, so far from being "unknown to the ancient Romans," it was in full force among them for centuries.[2]

A double inference is made from this mistaken notion, and as it enters into the present discussion with more than the force of an argument, it requires to be seriously treated. The inference seems to be first, that trial by jury being exclusively English, is not adapted to the temper or condition of other nations; and second, that, being a common law institution, it cannot exist with any but common law rules and forms.

Trial by jury is not the only point of coincidence between English and Roman law. We do not now allude to similarities by those principles and classifications which our early writers no doubt borrowed from that law. The distinctions of *real*, *personal*, and *mixed*, of *ex contractu* and *ex delicto*, of *in rem* and *in personam*, are doubtless based on natural differences, but were certainly derived by our law, with their names, from Rome. But there are historical coincidences which are not to be thus accounted for, and are very striking. There was an early period of the Roman law, when strict and technical forms prevailed, like those of the common law, both in the early times of rude liberty. The Roman *actiones legis* gave way to a more flexible and natural system. This system of civil law pleading, substantially the same with that of the continental nations of Europe, now, was doubtless the germ of common law pleadings. But the rigid forms and strict technicalities of these pleadings, similar to the earlier Roman forms, and the work of similar times and men, were not derived from that more liberal system which prevailed in the most flourishing times of the Roman

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[1] L. 78, P. *de Judicio.*

[2] There is an interesting French work on Roman procedure by Mons. Bonjeau, *Traité des actions*, 2d ed. Paris, 1842.

law. They were the additions of the school-logic of the middle ages. They too have partly given way before the necessities of a more complicated state of society. Connected with this is the other coincidence that, in the Roman as in the English law, there was a well-settled distinction between actions at law, *stricti juris*, and actions in equity, *ex æquo et bono*. But at Rome there were not two modes of trial. No difference seems to have been supposed to exist between the two kinds of action requiring different tribunals, or rendering it more difficult for citizens to understand one kind of issues than the other.

We will not argue that what was done at Rome must, or can be done at New York. But if the cases of France, Scotland, and Louisiana, go at all to prove that trial by jury is compatible with civil law pleading, and applicable to equity issues, the experience, for centuries, of the Roman republic, must carry a degree of weight. Not till the reign of Diocletian, was trial by jury expressly abolished at Rome. Decision of facts, by the law judge, at first rare and exceptional, became more and more usual; in that reign, it became the general rule, and the procedure of courts was by *petition* and *decree*.

The tendency, in New York, is at least the reverse of this.

The preamble, it is said, is a key to the statute. We have seen how fully the tenor of this code comes up to the promise of its preamble. The friends of the old system will say the key unlocks a Pandora's box of legal doubt and dismay. The friends of change will point to the symmetry and simplicity of the new system. In conclusion, we would suggest one or two considerations to the doubtful and apprehensive.

Viewed merely as an experiment, this code of procedure is interesting, is of the highest value. Experiment is the first law of physical, why not of political philosophy also? We do not speak of reform. That word is colorable, and begs the question. The true word is change, and the true ground of the friends of change, not that things will be, but may be altered for the better. If they always remain as they are, we shall never know how much better they might be. What we desire is, to *see* and *know*. Whether the experiment is worth the risk, depends, of course, on circumstances. It is a maxim, *fiat experimentum in corpore vili*. A body politic, like the state of New York, is not a cheap subject to be put to every

test. But the people of New York are intelligent and educated. And we would suggest, whether, in this connection, the degree of cultivation of the community to be affected, is not an important point. Habits are the laws of uncultivated nations. Change the habits of a savage tribe, or even of a people but civilized on the surface, like modern Russia and the great nations of antiquity, and you endanger its political life. But the case is widely different with modern nations, thoroughly penetrated by civilization, self-conscious, self-controlled, possessed of a history and printed records. With us it is too much the case that laws are but books. The new law is but a new leaf. But we have this advantage, that the old law is never lost; it is still on our shelves, and if a new system does not suit, we need only turn back a page or two to find the old one. In short, our idea is, that an enlightened nation of the present day, is capable of undergoing a degree of experimental legislation which, to other nations, would be the extreme of peril; and that such legislation becomes its privilege and duty.

But we believe the New York code will prove more than an experiment. It is a bold work, but it bears marks of a wise and skilful, although daring hand. The commissioners are not men of whom the disparaging remark can be made, that they are in haste to abolish a system to which they owe nothing, and of which they know nothing. They are all eminent in their profession. Mr. Graham is well known as the author of a most elaborate treatise on the old Practice of the Supreme Court.

Perhaps the code manifests too much of that impatience of legal forms which is natural to some minds. Some men would have judges administer law, like St. Louis, under the oaks of Vincennes. On the other hand, under the old Roman law, a man who brought an action for injuries to his vines, was turned out of court, because he sued in *de arboribus*, and not *de vitibus*. The New York code contains the germs, at least, of several very obvious classifications of actions. If it have gone to an extreme, there is nothing to exempt or exclude it from the fate of all other codes, amendment. But we are persuaded that many of its provisions will remain permanent and valuable features of the jurisprudence of New York.

# Recent American Decisions.

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*Superior Court, Connecticut, New London County, March Term*, 1848.

RAWSON *v.* THE STATE OF CONNECTICUT. In Error.

Where an information, on the statute entitled "an act regulating the sale of wines and spirituous liquors," averred, in the language of such statute, that the defendant, at a certain time and place, did keep a certain house, store, and shop, for the purpose of selling wine and spirituous liquor to be drank thereat; it was *held*, that the words house, store, shop, being synonymous, said information was not bad for duplicity.

In such information, it is not necessary to state the time, when the offence is alleged to have been committed, in words at full length, but the same may be expressed in figures.

Although penal statutes are to receive a strict construction, they are also to be so construed as not to lead to an absurdity, or defeat the manifest intention of the legislature.

THIS was an information against Calvin G. Rawson. The said complaint alleged, that said Calvin G. Rawson, of said Norwich, viz. at said Norwich, on or about the 24th day of May, A. D. 1847, with force and arms, he not being a taverner, did keep a certain house, store, and shop, for the purpose of selling wine and spirituous liquors, to wit, rum, brandy, gin. and wine, to be drank thereat, against the peace, and *contra formam statuti*.

The case was appealed to the June term of the county court, 1847. Before the county court the defendant demurred generally to the complaint; the court adjudged that said complaint and matters therein contained were sufficient in the law; and the defendant was sentenced. To obtain a reversal of which judgment he brought a writ of error in the superior court, March term, 1848, and the points appearing on the record, were argued by

*George Hill*, for the plaintiff in error, and by *John T. Wait* (state's attorney) for the defendant in error.

CHURCH, C. J. Upon a demurrer to this complaint, several objections have been made to its sufficiency, which I will concisely consider.

1. It is said that there is duplicity in the complaint; three distinct violations of the statute are charged in one count.

I do not so construe the language used. It is alleged that the defendant "did keep a certain house, store, or shop," &c. This is not a charge of keeping more than one building for the purpose intended; the language is in the singular entirely; "a certain house, &c." This phraseology, used in the statute, upon which the complaint is founded, has received a judicial construction from the supreme court of errors, at its last term in New Haven county, in the case of *State* v. ————, in which it was adjudged that the words "*store* or *shop*," as used in this statute, were synonymous. And the word house, as here used, means no more than shop or store.

2. It is objected that the complaint is insufficient, because figures instead of words, at full length, are employed to designate the year in which the offence was committed; and, also, that there is a want of exact precision as to the day, the averment being "on or about." That the complaint, in these respects, conforms to common practice, is, I think, certain. That it contains practical precision is also certain. That no advantage would accrue to the accused from greater certainty is obvious. The course of evidence is exactly the same.

I know, by the strict principles, or rather assertions, of the ancient common law of England, that it was said, and has been repeated by elementary writers, that in indictments for felonies the precision and form of averment here claimed were supposed to be necessary. In England, nearly if not quite all felonies were punished with death; and the strictness required was only in *favorem vitæ*. To require this in prosecutions for misdemeanors and police offences, would be in *favorem criminis*.

The practice in England was confined to indictments or informations filed, by the attorney-general, and never extended to proceedings before justices of the peace.

This is a complaint addressed to a justice of the peace by a single town grand-juror. Entire legal and technical precision is not necessary, and cannot be required, in such proceedings. The objects and ends of justice would be perverted by such a

requirement. Such proceedings are unknown to the common law, and there is no good reason why the technicalities of the common law, applicable to indictments and informations, should be observed in these complaints. It is sufficient, in such proceedings, that the offence be so charged, as that the accused can know, with reasonable certainty, what it is. The supreme court, in the case of *Goddard* v. *The State*, (12 Conn. R. 448,) recognize an essential distinction between complaints made to justices of the peace, by grand-jurors and tithing-men, and indictments and informations.

3. It is again objected, that no offence created, by the statute in question, is charged in this complaint. It is said that the offence consists in keeping a house, store, or shop, *by agent*, only, and that the word "*otherwise*," in the statute, is to be rejected.

The word *otherwise* is significant in the statute,[1] and to reject it would defeat the most prominent and clear intention of the legislature.

The leading rule of construction is, that the intention of the legislature, as conveyed by the language of the statute, is to control. There is no rule or principle adverse to this. *The entire language used* is to have effect, unless it should lead to absurdity, or defeat the legislative intention, or be in conflict with the constitution. This applies to all statutes, whether penal or not.

A penal statute is to be *construed strictly*, to be sure, but this rule is not intended to conflict with the other. They are not to be so construed as to defeat the intention of the legislature. To hold otherwise would be a gross absurdity. 2 Peters U. S. Rep. 358. By this rule nothing more is meant than that a penal statute shall not extend to acts, &c., not embraced *by its language*. No such attempt is made in the present case. It is sufficient that penal statutes be so construed as to give the accused the benefit of a doubtful construction. I believe no modern case, either in England or this country, can be found, which goes farther than this. The case of *United*

[1] Sec. 2. If any person or persons, except taverners, by an agent or otherwise, shall keep any house, store, shop or other place, for the purpose of selling any wine or spirituous liquor to be drank thereat, every such person so offending shall, on conviction thereof, forfeit and pay a fine of thirty dollars, &c.

*States* v. *Shelden*, (2 Wheat. R. 119,) is in entire harmony with this principle.

I think there is nothing erroneous in the judgment complained of.

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*Supreme Judicial Court of Maine, April Term*, 1848.

STROUT *v.* INHABITANTS OF DURHAM.

An inhabitant of a town, as well as a stranger, may maintain an action against the town for damages caused by a defect in the highway.

THIS action was for an injury sustained by the plaintiff from a defect in the highway in Durham. There was no doubt about the injury, or the defect in the road; but it was objected that the plaintiff, being an inhabitant of the town, and having notice of this defect, could not recover for the damage. But the chief justice, in delivering the opinion of the court, replied separately to these objections, overruling them; and cited Rev. St., and *Reed* v. *Northfield*, (13 Pick. 94,) in favor of the plaintiff. The statute makes no distinction between an inhabitant and a stranger, in respect to such injury. It is the duty of the town, both to notice defects in the highway, and repair them. An inhabitant has no authority to repair, and is not bound to do it, nor to give notice of the need of it.

Judgment for plaintiff.

*Howard* and *Shepley*, for plaintiff.
*Fessenden*, *Deblois* and *Fessenden*, for defendant.

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WARREN *v.* GIBBS AND TRUSTEE.

A member of a firm cannot be summoned as a trustee in his individual capacity, where he is only liable as a member of the firm.

THE question here was whether the trustee, John M. Wood, was chargeable. He was one of a firm of three persons, doing business under the style of John M. Wood & Co. The

other partners were out of the state. The trustees were described in the writ as "John M. Wood & Co." Wood alone was named in the writ and the only one summoned, and he disclosed that he had no dealings with the defendant individually, and was indebted to him in no other manner, than as a member of the firm of John M. Wood & Co.

*Freeman*, for the plaintiff.
*Poor* and *Adams*, for the defendant.

The court (TENNEY, J. delivering the opinion,) held that the process could not be sustained; that Wood was not indebted in his individual capacity, and no execution nor *scire facias* could issue on this process, against his partners, because they were not described in the writ. One partner may disclose for the firm, and judgment be rendered against the firm on such disclosure, but it is necessary that they should all be named in the writ, and, if within the state, be served with process.

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## WEBSTER *v.* ABBOT.

Contracts made on Sunday are void, unless for works of necessity or charity. Comparison of statutes.

THIS was an action upon a contract for the sale of real estate, which was made and signed on *Sunday*.

The court (SHEPLEY, J.) decided that, by the statute of Maine, the contract was void because made on Sunday; that it was neither a work of charity nor necessity. The decisions in New Hampshire and Vermont were approved, and a distinction pointed out between the English statute and the statute of Maine. The former prohibits labor to persons in their "ordinary calling," while the latter prohibits all "work, labor, or business, except of necessity or charity." The decisions, therefore, under the English statute, can afford no precedent, nor rule of construction under that of Maine. So, also, of the New York statute, which only prohibits "sales" on Sunday.

Judgment for defendants.

*Willis* and *Fessenden*, for the plaintiff.
*Fessenden*, *Deblois* and *Fessenden*, for the defendant.

### Jordan *v.* Protection Insurance Company.

A petition for the removal of a cause from the State to the United States courts, should be filed at the time of entering the appearance.

The defendant's counsel in this case, entered an appearance generally for the defendants on the fifth day of the term in which the action was entered, and on the twenty-second day filed a petition to remove the cause to the circuit court of the United States, under the statute of the United States, and filed the necessary papers. The presiding judge ruled that their application came too late, and refused the prayer of the petition, to which the defendants excepted.

*Willis* and *Fessenden*, for plaintiff.
*Fessenden*, *Deblois* and *Fessenden*, for the defendant.

The court (by Tenney, J.) overruled the exceptions, deciding that by a fair construction of the statute, the petition for removing the cause should be made at the time of entering an appearance, — the object being to transfer the jurisdiction to another tribunal, and entering appearance generally acknowledged jurisdiction. The construction contended for by the defendant's counsel, that the *time* mentioned in the statute meant the *term* at which the action was entered, could not be sustained. There was no authority for giving the two words a synonymous meaning. The law requires that justice should be administered without delay. Removal of causes from one tribunal to another would create delay, and such petitions are not to be granted, as of course, unless the language of the statute clearly demands it. The judge commented upon a case in the Kentucky reports, and upon *Livingston* v. *Gibbons*, (4 Johns. Ch. R. 94,) which sustained his position.

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### Smith et al. *v.* Blair et al. and Atlantic and St. Lawrence Railroad Company, Trustees.

Questions of liability of trustees.

The railroad company had contracted with the defendants for the performance of certain work upon their railroad, and to

pay them (defendants) from time to time, as the work proceeded on the certificate of the engineer, who was at liberty to deduct whatever sum he thought proper. The estimates of work were rendered monthly, and payments made thereon, reserving ten per cent. for the completion of the work. Several trustee processes were commenced prior to the present one, but between the periods at which the estimates of the engineer were made, but at the time of the service of the plaintiff's writ, there was due from the trustee a certain sum under the preceding estimate.

*Willis* and *Fessenden*, for plaintiff.
*Codman*, contrà.

The court (by WHITMAN, C. J.) decided; (1,) That the trustees were not liable until the amount payable had been determined by the engineer, according to the contract. In the mean time, nothing was due on which the process could attach, for the defendants were only entitled to pay upon the engineer's certificate. Nor, (2,) were they liable by reason of the reserved ten per cent., because it was uncertain whether the contract would ever be fulfilled, or whether the work would be acceptably done, and so nothing was due — it was a mere contingency. In this case, a certain sum appearing to be due on the engineer's estimate, the trustees were charged.

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## MASON *v.* MASON.

Assumpsit will not lie by one tenant in common against another for rents and profits of the common estate.

THE parties to this action were tenants in common of a parcel of land, of which the defendant was in possession. The plaintiff undertook to cut grass upon the premises, but was forbidden by the defendant, who cut it himself. The plaintiff afterwards brought an action of *assumpsit* (declaring in a count for money had and received,) for one half of the income of the land. The defendant objected that *assumpsit* would not lie by one tenant in common against another for the rents and profits of the common estate.

*Howard* and *Shepley*, for the plaintiff.

*Fessenden*, *Deblois* and *Fessenden* and *True*, for the defendant.

The court (by SHEPLEY, J.) sustained this position, denying the position of the plaintiff that an action of *account* would lie, and therefore *assumpsit* would lie also. An action of *account* will not lie, at common law, by one tenant in common against another, and the statute of Anne, which altered the common law, gave the action of account only where one tenant in common received more than his just share as bailiff. And in England, under this statute, it has been decided that the tenant, who takes the income merely, is not liable in an action of account; — he must be the bailiff of the other tenant, and, as such, receive more than his share. There is no case in which an action of *assumpsit* has been sustained on any different principle, and none can be sustained unless money has been actually received, or one tenant holds the share of the other as bailiff. The case of *Munroe* v. *Luke*, (1 Met. 459,) was decided on this principle. The defendants, in that case, took the whole rents and profits in money.

Judgment for defendants.

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*Court of Appeals of South Carolina, May Term*, 1848.

## RICHARDSON *v.* BROUGHTON.

The provincial act of 1740, § 34, which is still in force in South Carolina, denies to slaves the right to hold property in certain articles, and then provides that "it shall and may be lawful for any person or persons whatsoever to seize and take away from any slaves all such goods, commodities, boats, periaugers, canoes, horses, mares, neat cattle, sheep or hogs, and deliver the same into the hands of his Majesty's justice of the peace, nearest the place where the seizure shall be made." This act does not justify a trespass, nor does it authorize the party seizing such property to enter land of another.

Evidence of conversation with a magistrate previously to attempting the seizure, held inadmissable.

THIS case was first tried at an extra term of the court of common pleas, for Sumpter, in July, 1847. It was an action

of trespass for breach of the plaintiff's close, and taking away his cattle and hogs. In the defence, a justification was attempted under section 34 of the Negro Act of 1740, and the plaintiff's assent was alleged. The jury found a verdict for the plaintiff for $450, under instructions from Wardlaw J., who held, that to justify a seizure under the act referred to, there must be live stock of some of the kinds mentioned in the act, bred or kept for the peculiar use and benefit of a slave, and such possession thereof by the slave that it may be taken from the slave; that the right to enter the master's enclosure is not expressly given by the act, but as he thought, was contained in the right of seizure, subject to the obligation incurred by the person who undertakes the exercise of the right to show the requisite circumstances upon which it depends; that if the act had related only to horses, he should have held that the possession of the slave, within the master's enclosure, must be actual bodily contact and use: but as neat cattle, hogs and sheep were also mentioned in the act, the possession required must be such as a slave may have of such articles, distinct from the possession of the master; that as to hogs, being in a pen near a slave's cabin, he thought that might be the possession of the slave within the contemplation of the act, but a hog ranging in the master's swamp, he thought would not be so situated that a taking of it could be a taking from the slave — nor a cow in the master's field, unless by permission of the master, the control was entirely in the slave; that an article might be said to be kept for the peculiar use and benefit of a slave, which the master permitted the slave to control and dispose of at pleasure, but not one of which, by arrangement for the convenience of the master or in discharge of his duty to the slave, some special use was given to the slave, while the dominion of the master was presumed, as a cow kept by a slave, according to the master's directions and milked by and for the slave, but disposed of at the master's pleasure.

He directed the jury, if they found that the cattle and hogs had been kept by slaves for their peculiar use and benefit, and had been taken from the slaves, to find for the defendant: if not, to find for the plaintiff, damages — small, if the defendant acted under a belief of right without malice — higher, if (as was alleged) he had from evil motive done unnecessary injury,

or had himself really instigated and overruled the whole proceeding and then endeavored to skulk behind an underling and shield himself by falsehood and unfairness.

The defendant appealed from this decision, and the case was argued before the court of appeals.

*W. F. Dessaussure*, for the plaintiff.
*F. J.* and *M. Moses*, for the defendant.

The opinion of the court was delivered by

WITHERS, J. The points raised for our decision in this case, are:

1st. Had the defendant the right to enter the plaintiff's enclosure to seize the cattle and hogs, alleged to be subject to such seizure and to forfeiture?

2d. Was the exclusion of verbal instructions by a magistrate to Jared W. Cantey, with whom the defendant was confederated in the transaction, error in the circuit court?

3d. Are the damages so far excessive as to warrant the interference of this court in granting a new trial?

We are not ignorant that the determination of the first question carries with it an interest to the community, as well as to the parties in this litigation — and, therefore, we have endeavored to derive from the argument at the bar, and researches into the series of our provincial systems of slave-law, whatever light was attainable upon the subject. Though the codes of law for the government and regulation of slaves, of a date prior to 1740, have expired by the terms of their own limitation, they are nevertheless sources from which some light may be borrowed, and reflected upon the provisions of the latter code, which, in its main features, exists to the present day, by virtue of a reviving act in 1783.

By the 34th section of the negro act of 1740, (7 Stat. 409,) an evil is declared to exist in permitting slaves to keep canoes, and to breed and raise horses, neat cattle and hogs, and to traffic and barter for the particular and peculiar benefit of such slaves, thus gaining a facility to receive stolen goods, and to confederate and conspire for insurrection. It was, therefore, enacted that it should not be lawful for any slave to buy, sell, trade, traffic, deal or barter for any goods or commodities, "nor shall any slave be permitted to keep any boat,

periauger or canoe, or to raise and breed, for the use and benefit of such slave, any horses, mares, neat-cattle, sheep or hogs," upon pain of forfeiture of all goods and commodities for which he may have trafficked, and of such specified articles and stock "which any slave shall keep, raise or breed, for the peculiar use, benefit and profit of such slave," — then follows the particular clause which is material in this case, as follows: — "and it shall and may be lawful for any person, or persons whatsoever, to *seize* and *take away from any slave* all such *goods*, *commodities*, boats, periaugers, canoes, horses, mares, neat-cattle, sheep or hogs, and deliver the same into the hands of any of his majesty's justices of the peace, nearest the place where the seizure shall be made," — whereupon the justice is to ascertain on oath of the party seizing, the manner thereof, and if found to be done legally, the goods so seized are to be forfeited, and sold at auction, subject to a provison in favor of a reclamation under an oath specified to be taken by one who may have a right to, or the lawful custody of such goods. The oath prescribed is in the words following — "I do sincerely swear that I have a just and lawful right or title to certain goods seized and taken by C. D., out of the possession of a slave named ——; and I do sincerely swear and declare, that I did not directly or indirectly, permit or suffer the said slave, or any other slave whatsoever, to use, keep or employ the said goods for the use, benefit or profit of any slave whatsoever, or to sell, barter, or give away the same; but that the same goods were in the possession of the said slave by theft, finding or otherwise, or to be kept *bona fide* for my use, or for the use of E. F., a free person, and not for the use or benefit of any slave whatsoever."

The question is, had Broughton the right to enter the plaintiff's close, to seize, as he did, the stock captured on this occasion?

We think he had not; and therefore, that in this very material particular the charge was more favorable to him than the law warranted. We are to be understood as holding this proposition, even though it be assumed that the cattle and hogs were such as came under the condemnation of the statute.

The earliest period at which the legislative policy in question is found to have been adopted, was in 1714, — when the

owner of a slave was forbidden to allow him to plant for himself any corn, peas, or rice, or to keep for himself any stock of hogs, cattle or horses, under a penalty upon the master, to be recovered by *qui tam* action. (7 Stat. 368.)

The form which this policy next assumed, is found in the act of 1722, sec. 35, (7 Stat. 382,) where the inconvenience was alleged to arise from the danger of insurrection by reason of slaves being permitted to keep and breed horses. Then it was required of any justice of the peace, who from personal knowledge or from information should ascertain that any slave *kept* any horse or neat cattle, that he cause the same to be taken away and sold. And it was declared lawful for *any person* to seize hogs *kept* by slaves, and all boats and canoes *belonging* to them, and give notice to the next justice.

In the first-mentioned act it is manifest that no entry upon the premises of the owner of a slave offending in the particular specified was at all permissible, or in contemplation. In the second act mentioned, the right so to enter by the justice or his constable, is by no means clear; and it is to be remarked that in regard to horses and neat cattle, the justice alone could deal with them.

In 1735, the law of 1722 was reënacted in substance, but the mode was specified there, to wit: a justice should empower by warrant a constable to take away and sell the horse or neat cattle. As before, any person might seize the hog, boats or canoes, (7 Stat. 394.) But the 32d section, at page 395, affords a ray of light to the question. It enacts — "That every person who shall send any slaves with periaugers, boats, or canoes, shall give them a ticket." Then we reasonably infer that the capture permitted, in regard to the water craft, was expected to occur beyond the eye and premises of the master.

The next step was the act of October, 1740; which has been heretofore quoted in substance.

According to the scheme of that, our existing law, it will be seen that the power vested in a justice of the peace from 1722, in relation to horses and neat cattle, was denied to that officer, and the right of seizure by a private person was extended not only to them, but to a vast range of other articles of property, to wit, to any goods or commodities that a slave had acquired

by selling, trading, dealing, trafficking or bartering, except in cases permitted, as well as to boats, periaugers, canoes, horses, mares, neat-cattle, sheep and hogs. Now if it be insisted that under previous legislation, a magistrate might enter a man's premises, or authorize another so to do, to confiscate, this power was confined, even when supervised by an officer of the law, to horses and neat cattle; and is it not incongruous to contend that while this restricted power was withholden from such public officer, by the act of 1740, the same power (delicate and liable to great abuse when most guarded by discretion) should have been, by design, vested with a vastly enlarged range of operation, in "any person?" It is manifest that in the whole system of legislation in regard to slaves, the law-making power of provincial times proceeds, with a cautious step; for the several acts were temporary; as was the case with that of 1740. Indeed it seems to have been defunct from 1746 to 1783. From such caution the inference is that earnest attention was paid to the lessons of experience, to practical developments, from year to year; and that, if magistrates within their limited range, ever did enter or cause to be entered the plantations of slave-owners, in quest of condemned goods, it had been found to be an injudicious license, even for them, and hence was withdrawn in 1740; and *a fortiori* it must have been deemed inexpedient to commit to the hands of any private person an inquisitorial power, pregnant with vexation, oppression and turbulence, and boasting little affinity to some of the most cherished and stable maxims of the English common law.

It is eminently proper, when we are seeking, through the mists of more than one hundred years, the true interpretation of a legislative act, to resort for aid to such objects of pursuit as are declared to have been in contemplation by the legislature. Was it necessary that a man's plantation, or, it may be, his negro houses within the curtilage, should be open to invasion, night or day, as might suit the convenience of a captor, in order to advance the great ends in view?

In 1722 the danger was declared to arise from the facility of intercourse between different parts of the country by negroes upon horses of their own, whereby insurrections might be hatched and matured. While it might be well, therefore, to subject to capture a horse ridden by a negro and belonging to him,

with no lawful permit, beyond his master's premises, what harm would come to the public peace and safety if the negro and horse remained on the master's plantation? The same remark will apply to water craft. In 1740, to the evil apprehended of dangerous conspiracies was added that of receiving stolen goods, under guise of the ownership of the several descriptions of stock mentioned. And it should be remarked, that throughout this latter legislation upon the subject, the idea of dealing and trafficking goes *pari passu* with every other purpose disclosed. Now if one's goods in specie — if stock alive — were traced under the cloak which was supposed to be found, to cover the reception of stolen goods, in the breeding and raising by negroes of the animals mentioned, a search-warrant was sufficient, and accessible to anybody, to detect and reclaim what was lost and could be identified. But the moment these animals were slaughtered, or otherwise transported beyond the plantation for barter or sale, then the danger apprehended would become imminent; and even though the sheep, hog, or steer should have been bred and raised by the slave, it *then* became liable to be captured, and then, in the true legitimate and beneficial sense, any "person or persons whatsoever" might "*seize and take away from* any slave" such article; for the statute had declared it unlawful for him to have bred or raised it, under the penalty of just such a seizure and forfeiture.

It is declared to be unlawful for any slave to barter or traffic for goods or commodities, (except under very restricted limits, as to slaves residing, or usually employed in Charleston,) and these goods and commodities are liable to seizure, precisely as the live stock mentioned. It is an argument to ask, whether it ever was designed, or could now be tolerated, that a man's enclosure should be invaded, perpetually it might be, by private persons, with no process of law, to hunt up and capture every mackerel, pound of sugar, yard of tape, or bottle of molasses, that might be unlawfully acquired by one of his slaves? Such a rule of law, diligently enforced, could have but a short and turbulent existence — or, if it triumphed, it is much to be apprehended it would triumph over many, at least, of our opinions, touching the value of the institution of slavery. We are glad to find no cogent and sound rules of interpretation, that

drive the country to such a result or hazard; none that might serve to place the police of the slave-owner's domain under that species of vigilance that, too often, might be quickened less by a reverence for the law, than by a covetous craft or a restless malice.

By confining this right to the sphere which has been prescribed, there does seem to be a more prudent, rational and natural execution of the purpose, which is to "seize, and take away from any slave," an article contraband, bred, raised, or acquired, "for the *particular and peculiar* benefit of such slave;" or, (as elsewhere expressed in the act,) "for the *peculiar use, benefit and profit* of such slave." It is not quite apparent, when a slave raises a hog by his master's leave, and kills and eats it, or divides it among the inmates of his cabin, with his master's knowledge; or, when he builds a canoe, and fishes by its aid in his master's mill-pond, that this, in propriety of language — looking either to the force of words or the dictates of policy — shall be said to be for the "*peculiar use, benefit and profit*" of the slave. For if he lived the better, his master's benefit might also be found in that, seeing that the honest diligence of the slave had not corrupted his morals, or disturbed the public peace, and the draft on the owner's supplies might be so much the less. And so of many other examples that might be mentioned.

It was urged by counsel, and suggested by the circuit judge, that the right of entry was incident to the power to seize. There might have been some force in this view, if it had been urged in defence of a magistrate or constable, at a time when either, or both, might have acted under the peremptory commands of the acts of 1722 and 1735; but even in that case it might have been well answered, that such reasoning begged the question; for the inquiry is, and would then have been, was it ever required that the seizure should be made on the owner's premises? The argument loses all its force, as to private individuals acting under the law of 1740, for they are *required* to do nothing; the power is one of permission merely.

A view may be gained, as to this right to enter the close, from another branch of the same law. There has ever been, and is now, a lively jealousy as to the possession and use of

firearms and other deadly weapons by slaves, and as to suspicious congregations of them in any place. It will be found, that while, in more ancient times, masters were required (once in every month — (*vide* Act of 1690, 7 Stat. 345) to search the habitation of their own slaves, in later times, when this search for weapons was to be made, or these assemblages to be supervised and dispersed, the law makes its own agents, and prescribes its own accustomed forms. Now, when we perceive that in the same code, and in more hazardous times, the public arm is fettered in this great, universal and truly public concern, shall we, at this day, incline to unbind, to invigorate and encourage it in the violation of private domain, when the object is merely to capture, for the fortuitous gain of one who never labored for them, domestic animals, goods and commodities?

It may be seen that in 1712, (when the code was far more stringent than at later times,) the right to capture any firearms by any person, found in possession of a negro, was to be exercised only when such slave was apprehended with the weapon, without a ticket, and out of the limits of his master's plantation. (See, upon the same subject, sections 3 and 5 of Act of 1722, 7 Stat. 372; and section 4, Act of 1735, 7 Stat. 386–7.)

We may be permitted to look at this question from a more elevated position. In the preamble to three several acts preceding that of 1740, we may find the temper of the times, arising, no doubt, from the greater rudeness of the institution of slavery — attributable, it may be, as well to the comparative inexperience of owners, as to the fierce nature of newly imported Africans. Accordingly we have it on the front of the acts passed from 1714 to 1735, both inclusive, that slaves were of a nature too barbarous, wild and savage to be fit for the mild sway of the common law. Yet we do not find within that period, full as it manifestly was of solicitude concerning the tendency of slaves to insurrectionary ideas and plots, any instance wherein the sanctity of the private domain was opened to the intrusion of unofficial persons. Magistrates, constables, or patrols, with a suitable *posse*, when that was needed, were alone to pry into the proceedings or purposes of suspicious clubs or confederacies of slaves, and were alone to make search for

deadly weapons. When we reach 1740, we enter a milder light and more tranquil atmosphere, and are met at the threshold with the evidence that time had worked its amelioration; and it is most agreeable to know, that in the long period of intervening time, the persuasions of domestic sympathies, the steady light of moral example, the more enlightened dictates of self-interest, the tremendous power of the Christian religion, have worked with eminent success their transforming influences upon both races. We read, in the language of 1740, as follows: "Whereas in his Majesty's plantations in America, slavery has been introduced and allowed, and the people commonly called Negroes, Indians, Mulattoes and Mestizoes, have been deemed absolute slaves, and the subjects of property in the hands of particular persons, the extent of whose power over such slaves ought to be settled and limited by positive laws, so that the slave may be kept in due subjection and obedience, and the owners and other persons having the care and government of slaves may be restrained from exercising too great rigor and cruelty over them, and that the public peace and order of the province may be preserved." Now — the suggestion presents itself, admitting the point presented by the defendant in this case to be dubious — it seems neither judicial, philosophical, nor humane, to roll back the tide of advancing liberality; to supplant, by the darkness of an earlier day, the light of our own; to introduce into the plantation or homestead of every slave-owner a seeker after waifs as it were, with an appetite for fortuitous gain whetted into keenness; with a range of police discipline fearfully enlarged, which, in its smallest proportions, had been deliberately withdrawn from a magistrate and constable; — and all this in the face of reasonable confidence in the plantation police of the owner himself, justified by the immense improvement, in that particular, of modern times. We deem it neither safe, well or necessary to travel towards such a result by the construction of any ancient legislative provision, unless its words, with context conformable, be of the clearest import and the most cogent force.

We find nothing in the case of *Blake* v. *Clarke*, (3 McC., 179,) that touches this question. A patrol there made the seizure, and they, of course, might lawfully enter *as patrol*, though, on circuit, they were held to be trespassers, most pro-

bably, however, for taking chattels that proved to be exempt from seizure. Upon that ground, the case turned in the court of appeals, and our present leading question was not considered.

2. Was the magistrate's verbal instruction or advice, improperly excluded? It is enough to remark, that inasmuch as he had nothing to do with the capture, the instructions or advice of any body else, might as well have been adduced. In addition, it is not easy to conceive, how his advice could have aided the party engaged any more than the doctrine of the circuit judge, which held, that they had a right to enter. Nor is it quite clear, that anything he may have said to Cantey, who was not sued, was available to Broughton, who was.

3. As to excessive damages: the main foundation of Broughton's defence, has been ruled in his behalf, erroneously in his favor, according to our opinion, as already has appeared, and he can scarcely expect to fare better, if that proof be withdrawn; as in a new trial he would find it to be. Nor, are we disposed to interfere, in such a case as this, with the appropriate and peculiar function of the jury.

The motion, therefore, is refused.

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[From the Pennsylvania Law Journal.]

*Circuit Court of the United States for the Eastern District of Pennsylvania, November*, 1847. *In Equity.*

FOWLE *v.* SPEAR.

A court of equity will not, in a contest between persons who profess to be manufacturers of *quack* medicines, interfere to protect the use of trade marks, by injunction. A complainant, whose business is imposition, cannot invoke the aid of equity against a piracy of his trade-marks.

THIS was an application for an injunction, upon notice given to the defendant, to restrain him from using wrappers, labels and bottles, resembling those used by the complainant in his business of selling "Wistar's Balsam of Wild Cherry."

The bill, filed November 7th, 1847, stated that Lewis Wil-

liams, in 1844, was proprietor and possessor of the original receipt for preparing and compounding a certain valuable medicine invented by Dr. Henry Wistar of Virginia, called "Wistar's Balsam of Wild Cherry," and that the said Williams prepared the same, and sold it in Philadelphia, and all the principal cities in the United States, with great profit and advantage; that about the 20th of May, 1844, Williams transferred to Isaac Butts of New York, and his assignees, the sole and exclusive right to manufacture and sell the said medicine in various states and places, including all the eastern part of Pennsylvania, which right Butts, on the first of March, 1845, conveyed to complainant, together with all the apparatus and appurtenances used in manufacturing the medicine, and all stereotype plates, pamphlets and bottle moulds used in vending the same. The bill contained, as part of it, the advertisements, wrappers and labels used in advertising the medicine by Fowle, and a bottle filled with the medicine, and stamped with the words, "Wistar's Balsam of Wild Cherry. Philadelphia, I. B." was deposited with the bill, and referred to in it as an exhibit. The bill then further alleged, that the defendant, for the purpose of selling some composition which he called "The original Dr. Wistar's Balsam of Wild Cherry," and inducing persons to purchase the same as complainant's medicine, had caused to be manufactured bottles, which exactly resembled in size and shape those used by complainant, and caused the same inscription to be stamped thereon, except two letters, "I. B.," for which defendant substituted "W. & Co." but which, as was done by complainant, defendant covered with the label he used, and also used wrappers and labels substantially the same as complainant's. The wrappers, advertisements and labels, used by the defendant, formed part of complainant's bill, and one of the bottles used by defendant was deposited with the bill, and referred to therein as an exhibit. The facts and allegations set forth in the bill were supported by the complainant's special affidavit thereto, and the affidavits of three other persons were filed in support of certain of the material facts and allegations thereof. A motion was made for an injunction upon the filing of the bill, and notice given to the defendant, who appeared to oppose it; but no answer was filed nor any affidavits read on his part.

*Ingraham*, for complainant, in support of the motion for an injunction.

This case being heard upon the bill and affidavits produced by complainant, the only question is, as to the relief afforded by the law. The application is to restrain the use by the defendant of the complainant's *trade marks*, upon the well-known principles which courts of law and equity both enforce. The principle of protection is, that every man has a right to the means of distinguishing his own property from that of another. *Blofeld* v. *Payne*, (4 Barn. & Adolph. 401,) where it was decided that though you sell *your own* goods, you cannot use a wrapper resembling that of another person, and thus represent them as his; and this principle has been applied to a case where no mistake could have been made by a purchaser. *Lewis* v. *Langdon*, (7 Sim. Rep. 421.)

KANE, J. Is there any case in which a court of equity has interfered to protect a quack medicine?

*Ingraham*. The bill alleges that this is "a valuable medicine," and that is uncontradicted; besides, it is not very easy to understand what is meant by a *quack* medicine, and what is meant by a *quack* is still harder to define.

KANE, J. In a late trial for libel in this city, it seemed to be the result of the understanding of the most eminent of the faculty who were examined, that a *quack* meant a practitioner who prescribed or recommended a secret medicine.

*Ingraham*. That is very intelligible certainly, and of easy application, for unless I am greatly mistaken, the names of the most eminent of the faculty are to be found to certificates recommending Swaim's Panacea; but the answer to the suggestion is, that if the plaintiff has no right to the claim he makes and appellation he assumes, another person cannot use his own name, if it be the same as plaintiff's, in such a way as to produce an eventual deception. *Sikes* v. *Sikes*, (3 Barn. & Cres. 541); *Croft* v. *Day*, (7 Beavan, 84); *Hine* v. *Lart*, (stated 2 Sandf. Chan. Rep. 600.) Damages are recovered at law in such cases; *Southern* v. *How*, (Poph. Rep. 144,) and equity interferes by injunction. *Dolland* v. *Bell*, *Harris* v. *Callaghan*, (Rolls, 1825,) and *Partridge* v. *Fatman*, (Circuit Court of Pennsylvania, May, 1847,) were cited, and also the case of *Tom Pouce*, or General Tom Thumb, in the "Tribunal de

Commerce," at Paris, May, 1845; *Stratton* v. *Roqueplan*, in which Roqueplan was enjoined from using and announcing in playbills or placards, that one Duhamel would appear in the character of Tom Pouce; which name had become the property of young Stratton, and therefore no one else could use it. These cases were cited from newspaper reports. *Gout* v. *Aleplogu*, (6 Beav. Rep. 69, n.); *Coats* v. *Holbrook*, *Taylor* v. *Carpenter*, (2 Sandf. Chan Rep. 586, 603,) were also cited and commented on, and also 2 Keen's Chan. Rep. 213, and 2 Man. and Granger's Rep. 385. It is not at all material that the acts complained of should have been knowingly done; *Millington* v. *Fox*, (3 Mylne & Craig, 338,) which case, for the process was secret there, and *Croft* v. *Day*, decided the very point presented for adjudication, the resemblance "being sufficient to mislead the ordinary run of purchasers."

*Goodman* (and *Guillou* was with him) resisted the motion. This claim to protection of mere names is of recent origin, and may be traced to the protection afforded in England to persons who have served apprenticeships before they are permitted to work at a trade. It will not be extended here so as to protect a *useless* compound, by protecting the shape of bottles, and any designation that may be used to sell articles not clearly of a useful nature; and that is the answer to *Croft* v. *Day*, for there is no allegation that Day & Martin's blacking itself is protected by a patent. The case in Popham is clearly on that ground; and Lord Hardwicke's determination not to protect a complainant in the exclusive use of the stamp of the "Great Mogul" on packs of cards, any more than he would prevent "one innkeeper from setting up the same sign with another," 2 Atk. Rep. 485, proceeded upon the same principle. The spirit of our patent laws is on the same principle; it must be for some "useful" invention; and in England the doctrine has been applied in practice to publications not deemed of a meritorious character, the piracy of which will not be interfered with by injunction. The cases of *Walcot* v. *Walker*, (7 Ves. 1,) and *Southey* v. *Sherwood*, (2 Meriv. 438,) illustrate the course of courts of equity; and the case of *Pidding* v. *How*, (8 Sim. Rep. 477,) is conclusive that in this stage of the cause such a court will not interfere, any more than it will in any

*doubtful* case. 3 Paige Chan. Rep. 214. In addition to the cases referred to by the complainants, Eden on Injunction, 70; Drewry on Injunction, 235; *Cannon* v. *Jones*, (2 Ves. & Beames, 218); Daniel's Chan. Prac. pp. 1869–70, (Boston edit. 1846,) and 3 Dougl. Rep. 293, were cited; as also *Snowden* v. *Noah*, (Hopk. Chan. Rep. 347.) Besides, another ground of uncertainty in this case arises from the act of assembly of March 3, 1847, (Pamph Laws, 198,) in relation to "false stamps and labels." It is not clear that the answers to some of the interrogatories of this bill might not involve the defendant in a prosecution under that act; and the same ground upon which he could demur to any matter of that kind, will be his protection from an injunction till answer, if the court have any doubt, whether he is bound to answer at all, derived from the bill itself.

KANE, J. I have considered the application for an interlocutory injunction in this case, and have come to the conclusion that it must be refused.

The bill sets forth in substance, that the complainant is the manufacturer of a secret medicine, which he calls "Dr. Wistar's Balsam of Wild Cherry," and that he sells it in bottles of a peculiar form, enclosed in wrappers, which bear certain devices and directions. On one of these wrappers, which is made part of the bill, the Balsam is described as "a valuable family medicine for consumption of the lungs, coughs, colds, asthmas, bronchitis, croup, whooping-cough, difficulty of breathing, pains in the side or breast, liver complaints, &c.;" to which another paper, also among the exhibits, adds "influenza, hoarseness, pains or soreness of the chest, &c." The bill then charges, that the defendant has fabricated a different medicine, and is selling it in bottles of the same form, bearing almost the same title, and enclosed in wrappers, which proclaim in the same words exactly the same virtues for the spurious, as are asserted by the complainant for the genuine, balsam. The defendant has not answered, nor filed any responsive affidavit.

I should most anxiously avoid every appearance of discourtesy towards parties who have been so honorably represented before me; but speaking from the record, this is plainly a contest, real or simulated,— and whether it be the one or the other,

neither the highly respectable counsel, nor the court can know, — between the vendors of a quack medicine, the elements and action of which are not disclosed in evidence. For aught that appears, it may be innocent enough; but though "valuable," as it is sworn to be, to the party who compounds and sells it, it is readily conceivable that to him who buys and takes it, it may be far otherwise.

It is not the office of chancery to intervene, by its summary process, in controversies like this; "*non nostrum tantas componere*," looking at the incongruous group of diseases, for which the balsam prescribes itself to public credulity, I must apply the principle of the vice-chancellor's decision in *Pidding* v. *How*, (8 Sim. 477,) that a complainant, whose business is imposition, cannot invoke the aid of equity against a piracy of his trade-mark. The only remedy in such a case is at law.

Motion dismissed.

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## Notices of New Books.

**A Treatise on the Law of Evidence, as administered in England and Ireland; with Illustrations from the American and other Foreign Laws. By John Pitt Taylor, Esq., of the Middle Temple, Barrister at Law. In two volumes.**

Longum iter est per præcepta,
Breve et efficax per exempla. *Seneca.*

**London: A. Maxwell and Son, Law Booksellers. 1848.**

This work, on its title-page, purports to be an original treatise by the author. In the preface, it is stated, however, that it is "*founded* on Dr. Greenleaf's American Treatise on the Law of Evidence." It seems that Mr. Taylor, at first, only proposed to publish an English edition of the latter work; but that after the labor of several months, he "finally determined to abandon it, and to submit to the public a treatise of his own." He adds: "in taking this step, I had no idle hope of being able to produce a book, which, regarded as an exposition of general principles, should surpass, or even equal that written by the learned American professor; but I thought that, *by citing more fully the leading decisions of our own courts, and by introducing such portions of our statute law as related to the subject of evidence*, I might possibly compile a work of more practi-

cal utility to the English and Irish lawyer. To have introduced this new matter in the shape of notes to Dr. Greenleaf's Treatise, would have been highly inconvenient; to have interwoven it with his text, and still to have called the work by his name, would have been alike unjust to him and to myself; and consequently, it appeared to me, that the only alternative left was to publish a work in my own name, for the errors of which I should be alone responsible. I have still, however, availed myself very largely of Dr. Greenleaf's labors, having adopted, with but few alterations, his excellent general arrangement, having followed, to a considerable extent, the course even of his sections, and having borrowed many pages of his terse and luminous writings." And again he says: "From the American decisions, cited by Dr. Greenleaf, I have made a copious selection, having referred to such, as, in my judgment, either afforded favorable illustrations of doubtful points of law, or laid down rules superior to those adopted in our courts. Many of these cases I have myself collated, but, with respect to the major portion of them, 'I have been obliged to rely on Dr. Greenleaf's known accuracy, as I have had no opportunity of obtaining access to several of the reports cited by him.'"

It will be observed that, though Mr. Taylor makes these acknowledgments to Mr. Greenleaf, in his preface, yet, on his title-page, he seems to claim *exclusive authorship*. The London Law Magazine for May of this year alludes to this. "Mr. Taylor," it says, "has not produced *what perhaps his title-page might have led the reader to suppose, a work entirely his own*, but he has moulded and founded his book, as he ingeniously tells us in his preface, on Dr. Greenleaf's American Treatise. The work on Evidence, by that celebrated jurist, is well known among English, as well as American lawyers, and is justly appreciated by all for its admirable arrangement, logical order, and the lucid manner, in which the principles of the law, affecting evidence, are expounded."

On a careful examination of the work, it appears that the *arrangement* is borrowed from Mr. Greenleaf. This, of itself, is no inconsiderable part. So, also, are all the quotations from the Roman law. Besides these, there are many passages which are taken bodily, without any acknowledgment. Of 691 sections, which compose the first volume, 178 are copied either entirely or in substance from Mr. Greenleaf. Parts of very many others are taken from the same source. Mr. Taylor's additions consist of 1st. English statutes and rules of practice, not recognized in the United States; 2d. Some further illustrations, by additional cases, of the principles stated by Mr. Greenleaf; and 3d. Some few modifications of the same principles. It does not appear that he has developed any new rule of evidence.

To say that Mr. Taylor's work will not be useful to the profession in England, would be to condemn Mr. Greenleaf's Treatise; for the latter is so completely reproduced in the former, that it would be difficult to accord praise to the one which is not due also to the other. The American professor may regard his English exposition as an *alter ego*. So far as we have been able to examine Mr. Taylor's additions and amplifications, we consider them as well calculated for English practitioners, although, in many respects, irrelevant in our country.

In his appropriation of Mr. Greenleaf's labors, Mr. Taylor has improved upon the example of Mr. Theobald, who, some years ago, converted Mr. Justice Story's Commentaries on Bailments into notes to an English edition of Sir William Jones's little book on that subject. Mr. Theobald's course excited some severe strictures at the time. Some hard words were used with regard to him. He was called a "literary pirate," and a law of international copyright was invoked to shield American authors from the aggressions of such lawless rovers. But Mr. Theobald did not go so far as Mr. Taylor. The latter has done to an American author what he would not have ventured to do towards any English writer. The summary process of injunction would have protected the latter. Of course, in our own country, Mr. Taylor's work cannot be published or sold. But, in the absence of any law of international copyright, his course in England is open to censure only in the tribunals of criticism.

THE TRIAL OF WILLIAM FREEMAN FOR THE MURDER OF JOHN G. VAN NEST, INCLUDING THE EVIDENCE AND THE ARGUMENTS OF COUNSEL, WITH THE DECISION OF THE SUPREME COURT GRANTING A NEW TRIAL, AND AN ACCOUNT OF THE DEATH OF THE PRISONER, AND OF THE POST MORTEM EXAMINATION OF HIS BODY. By Amariah Brigham, M. D., and others. Reported by Benjamin T. Hall, Counsellor at Law. Auburn, New York: Derby, Miller, & Co., Publishers. 1848.

This is a volume of over five hundred pages, very carefully and thoroughly prepared. It contains a most careful report of all the evidence, of the arguments of counsel, and of the opinions of the court. Besides this, there is a brief sketch of the previous life of the prisoner, and an appendix containing the opinions of medical gentlemen, deduced from the *post mortem* examination.

We do not think too much can be said of the value of publications of this character. The printed report of the celebrated case of Abner Rogers, in this commonwealth, undoubtedly removed many prejudices from the public mind, and called the attention of the profession, more strongly than it ever had been previously, to the subject of insanity. The case of Freeman is stronger even than that of Rogers. The details of it are familiar to some of our readers, and as we intend to take advantage of this new publication, to speak hereafter more at length upon the subject of this trial, we cannot now say more of it. But we hail this volume with great pleasure. The innumerable questions which arose in the course of the trial, and which possess so much interest for the members of both the legal and medical professions, are now presented in an authentic shape, and we hope the work will find its way to the library of every member of either profession. The arguments of the Hon. William H. Seward, for the prisoner, and of the Hon. John Van Buren, the attorney-general of New York, for the people, are chaste specimens of forensic eloquence. In a word, the book is a valuable addition to medico-legal science, and sheds much new light upon the subject of insanity.

# Miscellaneous Intelligence.

## Trial of Sarah Jane Pinkerton, for the Murder, by Poison, of her Mother, Sarah Cain.

This case, which was tried at Boston on the 31st of May and the 1st and 2d of June last, before Chief Justice Shaw and Justices Wilde and Metcalf, deserves a place in the list of "remarkable trials." It is, we believe, without a parallel in the annals of American criminal jurisprudence, as well from the nature of the crime as its attending circumstances; it being the murder of a mother by her own daughter, a little girl of tender years, and by the administration of arsenic.

Hon. S. D. Parker, attorney for the district of Suffolk, conducted the prosecution in behalf of the commonwealth. The indictment contained three counts, one charging the murder by administering a dose of arsenic, on the morning of April 7th last; another, by the administering of a second dose in the afternoon of the same day; and the third from the combined effects of the two doses.

The defence was conducted by Alfred B. Ely and Oliver Dimon, Esqs. of the Boston Bar.

On the part of the prosecution, it was proved that the deceased was a hard-working Irish woman, living in Curve Street, in Boston, with the accused, her daughter by a former husband. On Thursday, the 6th of April, 1848, being *fast day*, she was at home. In the morning she complained of being very tired; at noon she laid down upon the bed; at night she was taken violently ill, and was sick all night, vomiting and purging, and complaining of violent heat and thirst. The neighbors were called in on Friday morning, and prescribed for her; but she grew worse till between eleven and twelve o'clock, when a physician was sent for, who thought it a case of cholera morbus and left a prescription. At about 5 o'clock, P. M., the physician called again and found her dying. She asked for an opiate that she might die easier, and appeared to be in the collapsed state of cholera morbus. The physician wrote a prescription and left. The woman died about seven o'clock Friday evening.

*Henry Whipple*, an apothecary, testified that on Friday, the 7th, between 11 and 1 o'clock, the prisoner came to his shop with a prescription from Dr. Flint (the physician) and, after procuring the medicine, purchased six cents worth of arsenic, which she said her mother wanted to kill rats with. He gave her one ounce; she asked him how to mix it; he told her, and she left. In the afternoon, between four and six o'clock, she came with another prescription, and got two cents worth more of arsenic, saying she had mixed the first too thin, and had thrown it away. The two cents were change left after paying for the prescription. She asked how long it would take a rat to die, and said she would watch and

see them die. He gave her a quarter of an ounce, and she left. He next saw her on Saturday night, when two men brought her to his shop, and asked him to tell his story; he did so, and she said it was true. One of them asked her why she gave it, and she said she would tell them in the street, and they left. *Daniel McGowan*, formerly an apothecary, testified that the prisoner came to him early on Thursday for some arsenic to kill rats, but he had none. That on Friday night, knowing of Mrs. Cain's sudden death, he suspected foul play, and Saturday procured his son to open the body, having previously ascertained from the apothecary that arsenic had been sold. The body was opened, and on analysis of the stomach, arsenic was found. *Bridget Riley* testified that she lived with the deceased, who had last whipped the child eight days before. *Patrick Gallagher* testified that on Saturday night he asked Sarah if the report that she had poisoned her mother was true, and she said it was. *Jabez Pratt*, the coroner, testified that on Sunday he asked her if it was true that she had given her mother poison, and she said it was; that she gave her mother rat's bane; that she got it at the apothecary's, and told him that her mother wanted it to kill rats; that she gave it to her twice, that she got a fourpence worth in the forenoon, and gave a part of it; that she got the second portion in the afternoon, and gave it all; she said she did not know it would kill her mother; she knew it would kill rats, and knew it would make her mother sick. She said her mother beat her, and she gave it to her to *punish her*. That when taken into custody, she fell upon her mother's body, and wept, and said "O my mother how could I have done it." *Dr. William Ingalls* testified that she subsequently told him in jail, that her mother had latterly been quite intemperate, and when intoxicated had abused her, and that she gave it, thinking it would make her mother sick, and that she, the mother, thinking it was the liquor, could be induced to take the pledge again, which she had taken once before; she did not think it would kill her. It was also testified that the prisoner was a bright girl, who had attended the public school, and also Sunday school, and could read and write.

On the part of the defence it was shown, that on Saturday, April 8th, Whipple stated that he had sold no arsenic on Friday; but that some had been sold on Thursday, fast day; also that he testified before the coroner, on Sunday, that he sold the two portions of arsenic on Thursday, one in the forenoon, and the other about three o'clock in the afternoon, and that the accused at each time brought a prescription from Dr. Flint; that the elder McGowan had accused the little girl of the crime before he had ascertained that any arsenic had been bought, and spread suspicions against her among the neighbors. That when the confession was made to Gallagher, she was in a sort of custody, in the keeping of some women, lest she should run away. That when Pratt went to the house, the girl was seemingly in the custody of six or eight persons, who were about her; that she was so much agitated and alarmed, that she fainted, or went into a fit; that he commenced by saying, "*I understand you have admitted that you gave your mother the poison*," and told her *she had better tell the truth*, if she made any statement. It was also testified by one present, that he did not hear the girl say she did it *to punish* her

mother, and that she did not say that she gave it on Friday, as testified by Pratt; but said she gave the first dose on Thursday afternoon, and the second on Friday morning. It was also shown that the prisoner was not fourteen years of age till the 10th of April; that she was an affectionate child to her mother; that there were persons more or less present with her mother, at all times during Friday; that the deceased had latterly been an intemperate woman, and drank with the neighbors, in her own house, on Thursday afternoon; that there were in fact many rats about the house, and that arsenic had been before used to destroy them; that for some months or a year past, the prisoner had been subject to fits, at times of considerable frequency and violence; that these fits were both hysterical and epileptic in their nature, growing out of uterine difficulties; and were caused by the non-establishment of menstruation. Also that her mother had been very harsh and injudicious in her treatment of the child, and had whipped her from her earliest years, often with cruelty and without discrimination. It was testified by eminent medical men, that the changes which females undergo when verging into puberty, affect the mind, sometimes to a very considerable extent; impairing the intellectual and moral faculties, and producing inconsistent, and, at times, outrageous conduct. That at the time when nature makes its efforts to set up the process of menstruation, diseased peculiarities of mind and body are not unfrequent; producing nervous irritability, changes of temper, alterations of judgment, and, at times, unaccountable perverseness of conduct. The fits described at her age, arising from this cause, would lead us to expect insane irregularities in the mental and moral condition of the person.

Judge WILDE charged the jury.

First. Is there evidence enough to convict of murder, or manslaughter? Is the defendant of such an age as to make her responsible for murder or manslaughter? This is to be decided by the intelligence and discretion of the prisoner. Under seven the law is peremptory that a child cannot be subject to capital punishment. Between seven and fourteen the presumption is that the child has not discretion to commit the act. This may be rebutted by proof of capacity, and knowledge of right and wrong. The prisoner stands within the rule, being under fourteen when the act was committed. You are to be satisfied that she had sufficient knowledge of good and evil to know that the deed which she committed was wrong. If she had she is responsible, and this the government must prove. The force of the presumption of incapacity decreases from seven to fourteen.

Next. Did she administer the poison? Whipple testifies positively that he sold arsenic twice on Friday, and never at any other time; and it is of the arsenic which she got of him that she speaks in her confessions, so that you must believe she administered it on Friday, if at all. You will consider the other circumstances of the sickness, its beginning on Thursday night, and the symptoms being like those of cholera morbus or of arsenic, which the deceased might have got in some other way. Dr. Flint says it is difficult to distinguish one from the other. And if you believe that this sickness produced the death independently of any arsenic

which the prisoner might have given on Friday, and that such arsenic did not *hasten* the death, then the defendant must be acquitted. But if you believe that she gave arsenic on Friday, which either caused or hastened the death, the act is murder or manslaughter, or otherwise, depending on the motive.

As to confessions, they are often unsatisfactory, on account of the uncertainty of the precise words used. But here words are of less consequence, as it was acts that were confessed. The great question as to confessions is, whether inducements were held out to confess falsely; and the court is to pass upon their admissibility. The objection to these confessions was early raised by the counsel for the prisoner, and we ruled that they should be admitted, and they are rightly in. It is for the jury, under all the circumstances, to give them the weight which they deserve.

As to the defence of *insanity*. There is not much occasion to consider this topic. The prisoner's counsel did not ask the doctors whether they considered her insane, and they did not say she was insane. But of this you may judge.

One matter remains. If the defendant is guilty at all, is it of murder, or manslaughter? You must consider the prisoner's motives, as stated in her confessions, and give them such weight as they deserve; and unless they are contradicted, or highly improbable, they are to be taken as true. If she did not intend to kill her, but only to punish her, or make her sick of drink, it is manslaughter; but if she intended to do her a great injury, or to kill her, it is murder.

To a question from a juror the judge answered: The intent may be inferred from the act. The administering medicine to make one sick is an unlawful act; and any unlawful act, resulting in death, would constitute manslaughter.

The jury returned a verdict of Not Guilty.

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## Obituary Notice.

Died at Salem, on the 5th June, Hon. JOSHUA HOLYOKE WARD, an associate justice of the court of common pleas, aged 39.

Judge Ward, at the time of his death, was the youngest judge of any court of record in Massachusetts, and had held a seat on the bench for only the short term of four years; and yet it is true of him, that he had lived and served long enough to acquire a reputation which is rarely attained for legal learning and skill, and to furnish a model of judicial exactness and accuracy, of facility in the despatch of business, and of courtesy and impartiality in his intercourse with counsel and all parties in court, which has been acknowledged in terms of striking commendation by the bars of all the counties.

The professional education of Judge Ward was pursued in the office of Mr. Saltonstall, at Salem, and at the Law School, in Cambridge; and it is well remembered of him, that he was a careful, regular, and indefatigable student. It was thus that he qualified himself to make rapid and sure progress, as soon as he engaged in practice; and his success ought to be contemplated with a sufficient reference to the thorough training to which he always attributed it. As a counsellor and a judge, he was remarkable for a quick and ready perception of the points of a case, of the proper application of principles and precedents, and of the bearing of evidence. His views were conceived and expressed with a remarkable clearness; and it was never difficult for him to make palpable, alike to counsel and to juries, the precise state of the law, and the material testimony, on which he saw that a case must turn. In criminal cases he was eminently successful in assuring the counsel, on both sides, that they should have the full benefit of every rule of law, and that exact justice would be dispensed in the mode of conducting the trial. As it was on the bench of the municipal court in Boston that he commenced and closed his judicial career, the vivid recollection of his earliest and latest services has called forth a special acknowledgment of his distinction in this department of arduous and complicated labor.

Judge Ward was compelled to terminate abruptly a term of the municipal court, when he returned home to pass through his last struggle with the excruciating disease which, for several years, had threatened the early termination of his life. It serves to increase our admiration of his judicial career, and especially of the cheerful spirit which he always exhibited, to be thus reminded that the heavy labors which devolved upon him were mostly performed while he was in a state of bodily infirmity and often under the torture of the most acute suffering.

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## Insolvents in Massachusetts.

| Name of Insolvent. | Residence. | Commencement of Proceedings. | Name of Master or Judge. |
|---|---|---|---|
| Adams, Edwin, | Boston, | May 6, | Bradford Sumner. |
| Allen, James E. et al. | Boston, | " 13, | Lester Filley. |
| Alexander, Henry S. et al. | Boston, | " 13, | Edward G. Loring. |
| Andrews, William H. | Newburyport, | " 5, | David Roberts. |
| Arey, Herman, | Edgartown, | " 27, | Theodore G. Mayhew. |
| Arnold, George, | Charlestown, | June 3, | S. P. P. Fay. |
| Bacon, Henry S. | Dana, | May 30, | Walter A. Bryant. |
| Barnes, Asa, | Hardwick, | " 2, | Walter A. Bryant. |
| Bartlett, Alfred, | Lawrence, | " 5, | James H. Duncan |
| Baxter, Enos K. | Cambridge, | June 8, | S. P. P. Fay. |
| Beecher, Henry, | Weymouth, | " 7, | Aaron Prescott. |
| Bent, George et al. | Braintree, | May 18, | Nathaniel T. Safford. |
| Bigelow, George, | Framingham, | " 9, | Nathan Brooks. |
| Bigelow, John R. | Cambridge, | April 29, | S. P. P. Fay. |
| Bleckman, Charles C. | Weymouth, | May 13, | Aaron Prescott. |
| Blake, Leander, | Pittsfield, | June 8, | Franklin O. Sayles. |
| Blanchard, Haskett D. | Salem, | May 29, | David Roberts. |
| Bolster, Olney. | Oxford, | " 1, | Henry Chapin. |
| Briggs, Theophilus P. | Boston, | " 8, | William Minot. |
| Briggs, John H. | Weymouth, | June 5, | Aaron Prescott. |
| Brooks, Alexander B. | Boston, | May 16, | Bradford Sumner. |
| Brown, Ebenezer L. | Roxbury, | " 15, | Sherman Leland. |
| Brown, Francis H. | Roxbury, | June 8, | Sherman Leland. |
| Brown, Sydney M. | Marlborough, | April 7, | S. P. P. Fay. |
| Buffington, Benjamin, | Taunton, | May 18, | Horatio Pratt. |

| Name of Insolvent. | Residence. | Commencement of Proceedings. | Name of Master or Judge. |
|---|---|---|---|
| Burnham, James, | Salisbury, | May 19, | David Roberts. |
| Burnham, George P. | Roxbury, | " 31, | Ellis Gray Loring. |
| Butterfield, Frederick P. | Boston, | " 20, | Bradford Sumner. |
| Calef, James A. | Boston, | " 29, | Bradford Sumner. |
| Carpenter, Seba, | Douglass, | " 20, | Henry Chapin. |
| Chilson, Paul, | Bellingham, | June 7, | Sherman Leland. |
| Christian, Henry L. | Newton, | April 5, | S. P. P. Fay |
| Coffin, Allen et al. | Edgartown, | May 31, | Theodore G. Metcalf. |
| Collins, W. Maoriah, | Newburyport, | June 3, | David Roberts. |
| Comerford, Patrick, | Boston, | May 4, | Bradford Sumner. |
| Cook, Charles, | Bellingham, | June 7, | Sherman Leland. |
| Cross, David J. | Roxbury, | " 8, | Sherman Leland. |
| Davol, James F. | Fall River, | May 13, | E. P. Hathaway. |
| Dean, William H. | Lawrence, | " 29, | David Roberts. |
| Dieudonne, Ann, | Roxbury, | " 16, | Sherman Leland. |
| Durant, Henry, | Pepperell, | June 8, | Bradford Russell. |
| Durant, John, | Pepperell, | " 8, | Bradford Russell. |
| Eaton, John, | Cambridge, | " 6, | S. P. P. Fay. |
| Eaton, Wyllis G. | Newton, | " 8, | S. P. P. Fay. |
| Ellis, Horatio B. | Andover, | May 6, | James H. Duncan |
| Engley, Albert, | Blackstone, | " 27, | Henry Chapin. |
| Farnsworth, Jonas, | Braintree, | June 7, | Sherman Leland. |
| Fay, Harrison F. | Brookline, | " 8, | S. P. P. Fay. |
| Fenno, Amos, | Waltham, | " 5, | S. P. P. Fay. |
| Field, Samuel, | Oakham, | Mar. 4, | Walter A. Bryant. |
| Fitzpatrick, Matthew, | Cambridge, | May 23, | S. P. P. Fay. |
| Galbraith, John, | Waltham, | " 24, | George W. Warren. |
| Gates, James F. | Ware, | " 29, | Laban Marcy. |
| George, Joseph M. | Newburyport, | " 23, | David Roberts. |
| Gibson, Abraham J. | Lancaster, | June 3, | Charles Mason. |
| Gilmore, Jonathan, | Chelsea, | May 26, | Bradford Sumner. |
| Goodnow, Erasmus D. | Princeton, | " 20, | Henry Chapin. |
| Gould, James E. | Lancaster, | " 29, | B. F. Thomas. |
| Gove, Charles O. et al. | Boston, | " 6, | Bradford Sumner. |
| Graffam, Benjamin, | Boston, | " 2, | William Minot. |
| Greehey, Patrick, | Lawrence, | " 31, | James H. Duncan. |
| Green, George H. | Taunton, | June 8, | C. J. Holmes. |
| Green, Samuel S. Jr. | Medford, | " 6, | S. P. P. Fay. |
| Greenwood, Joseph, | Leominster, | May 29, | Henry Chapin. |
| Hague, John B. | Newton, | " 22, | Nathan Brooks. |
| Hall, Isaac, | Boston, | " 19, | William Minot. |
| Harlow, Charles, | Cambridge, | June 6, | S. P. P. Fay. |
| Harrington, Luke, Jr. | Boston, | May 20, | Bradford Sumner. |
| Harris, Elijah, | Charlestown, | " 7, | George W. Warren. |
| Hastings, Emery, | Lancaster, | June 1, | Charles Mason. |
| Haynes, W. George. | Boston, | May 17, | Bradford Sumner. |
| Hazeltine, Benson C. | Lowell, | June 6, | Bradford Russell. |
| Heustis, Simon B. | Boston, | May 4. | Bradford Sumner. |
| Hill, William, | Cambridge, | " 9, | S. P. P. Fay. |
| Hodge, Roswell B. | Groton, | " 31, | Bradford Russell. |
| Holbrook, Edward, | Sherburne, | June 8, | S. P. P. Fay. |
| Howard, Owen, | Boston, | May 26, | Bradford Sumner. |
| Howard, William S. | Waltham, | " 29, | S. P. P. Fay. |
| Howe, George H. | Roxbury, | " 17, | Sherman Leland. |
| Hunt, David, | Weymouth, | June 8, | Sherman Leland. |
| Hunt, Lewis B. | Athol, | May 26, | Walter A. Bryant. |
| Ingalls, Oliver P. | Newburyport, | " 19, | David Roberts. |
| Innes, William, | Fall River, | " 12, | E. P. Hathaway. |
| Jackson, Abner C. | East Bridgewater, | June 12, | Welcome Young. |
| Jenkins, George W. | Boston, | May 29, | Bradford Sumner. |
| Johnson, Ralph C. et al. | Lowell, | June 8, | Bradford Russell. |
| Jones, Daniel, | Charlestown, | May 12, | George W. Warren. |
| Kelly, Daniel, Jr. | Andover, | " 30, | James H. Duncan. |
| Keith, Lewis, | East Bridgewater, | " 17, | Welcome Young. |
| Kettelle, William G. | Dorchester, | " 8, | Bradford Sumner. |
| Kimball, Moses, | Lowell, | " 31, | Bradford Russell. |
| Knowlton, Alvin, | Natick, | June 8, | S. P. P. Fay. |
| Ladd, John J. | Bradford, | May 22, | Ebenezer Moseley. |
| Lake, Edwin T. | Fall River, | June 2, | C. J. Holmes. |
| Lane, Edwin J. | Newburyport, | May 5, | David Roberts. |
| Leavitt, Erasmus D. | Lowell, | " 26, | Bradford Russell. |
| Leur, James, | Lowell, | June 8, | Bradford Russell. |
| Lewis, Abiel S. | Roxbury, | " 7, | Sherman Leland. |
| Lewis, William G. | Roxbury, | " 7, | Sherman Leland. |
| Littlefield, Samuel, Jr. | South Reading, | May 30, | George W. Warren. |

| Name of Insolvent. | Residence. | Commencement of Proceedings. | Name of Master or Judge. |
|---|---|---|---|
| Longley, Hiram, | Shirley, | May 31, | Bradford Russell. |
| Longley, Samuel, | Shirley, | June 8, | Bradford Russell. |
| Lord, William E. | Boston, | May 15, | Bradford Sumner. |
| Loud, David W. | Weymouth, | " 29, | Aaron Prescott. |
| Lovell, Shubael S. | Bridgewater, | June 7, | Welcome Young. |
| Lull, William, | Boston, | May 10. | Bradford Sumner. |
| Mason, Hazen R. | Lawrence, | " 22, | James H. Duncan. |
| Masters, Alonzo, | Bridgewater, | " 13, | Welcome Young. |
| May, Henry B. | Boston, | " 22, | Bradford Sumner. |
| McFarland, E. | Boston, | " 8, | Bradford Sumner. |
| McIntire, Jeremiah S. | Mendon, | " 16, | Henry Chapin. |
| McMahon, Edward, | Boston, | June 7, | Edward G. Loring. |
| Merrill, Stephen, | Salem, | " 15, | David Roberts. |
| Mitchell, Terrence, | Lawrence, | May 9, | James H. Duncan. |
| Mitchell, Leonard, | Bridgewater, | " 23, | Welcome Young. |
| Moors, Josiah, | Winchendon, | June 5, | Charles Mason. |
| Mulliken, John W. | Boxborough, | April 1, | S. P. P. Fay. |
| Noyes, James, | Lowell, | May 6, | Bradford Russell. |
| Nye, Israel F. | Boston, | " 6, | Ellis Gray Loring. |
| Nye, William W. | Fall River, | June 8, | C. J. Holmes. |
| Parker, W. H. George, | Boston, | May 31, | Bradford Sumner. |
| Perkins, Warren, | Reading, | June 5, | S. P. P. Fay. |
| Perry, Horace T. | Douglass, | May 1, | Henry Chapin. |
| Perry, Joseph F. | Roxbury, | June 8, | Sherman Leland. |
| Pierce, Jacob P. et al. | Boston, | May 16, | Bradford Sumner. |
| Pierce, Walker H. | Northboro', | " 12, | Henry Chapin. |
| Poor, Benjamin H. | Newburyport, | " 19, | David Roberts. |
| Prichard, Moses B. | Concord, | " 23, | Nathan Brooks. |
| Randall, Benjamin, | Pelham, | " 27, | Laban Marcy. |
| Randall, Abraham, | Weymouth, | " 25, | Sherman Leland. |
| Raymond, Obed, | Weymouth, | June 5, | Aaron Prescott. |
| Reed, Thomas, | Boston, | May 23, | Bradford Sumner. |
| Richardson, William, | Warren, | " 8, | Isaac Davis. |
| Robbins, Isaac, | Watertown, | June 2, | S. P. P. Fay. |
| Robbins, William, | Cambridge, | " 8, | S. P. P. Fay. |
| Robinson, George U. | Boston, | May 3, | Bradford Sumner. |
| Robinson, Egbert R. | Taunton, | " 18, | Horatio Pratt. |
| Robinson, Charles, | Fitchburg, | " 9, | Charles Mason. |
| Robinson, Joseph, | Ware, | " 26, | Laban Marcy. |
| Rodgers, Ammon, | Roxbury, | June 8, | Sherman Leland. |
| Ruggles, John H. | Newton, | April 26, | S. P. P. Fay. |
| Sands, John, | Lawrence, | May 9, | James H. Duncan. |
| Sargent, Rufus, | Newburyport, | " 19, | David Roberts. |
| Sargent, William, | Brighton, | " 12, | Edward G. Loring. |
| Saul, Joseph, | Salem, | " 20, | Bradford Sumner. |
| Small, Aaron H. | Newton, | " 22, | S. P. P. Fay. |
| Smith, Joseph N. | Charlestown, | " 29, | George W. Warren. |
| Snell, William, | N. Bridgewater, | " 31, | Welcome Young. |
| Southwick, David, | Northbridge, | " 16, | Henry Chapin. |
| Spear, Nathaniel S. | Quincy, | June 6, | Sherman Leland. |
| Stearns, Caleb S. | Dorchester, | " 1, | Sherman Leland. |
| Stowell, Alexander, | Charlestown, | May 3, | S. P. P. Fay. |
| Sullivan, Daniel, | Lawrence, | " 23, | James H. Duncan. |
| Teulon, William T. Jr. | Boston, | " 1, | Bradford Sumner. |
| Thayer, Eli, | Weymouth, | June 3, | Sherman Leland. |
| Thayer, Henry, | Blackstone, | May 30, | Isaac Davis. |
| Thomas, James, | Boston, | " 25, | William Minot. |
| Tilton, Samuel, Jr. | Boston, | " 6, | Bradford Sumner. |
| Tingle, William H. | Southbridge, | " 30, | Isaac Davis. |
| Tirrel, Thomas A. | Roxbury, | " 8, | Bradford Sumner. |
| Townsend, David, | Waltham, | June 7, | S. P. P. Fay. |
| Trask, Danforth, | Greenwich, | May 31, | Laban Marcy. |
| Tyler, Frederick, | Lawrence, | " 23, | James H. Duncan. |
| Viles, Nathan, Jr. | Boston, | " 24, | Ellis Gray Loring. |
| Vinton, Charles A. | Malden, | June 7, | S. P. P. Fay. |
| Webber, John A. | Roxbury, | " 8, | Sherman Leland. |
| Wellington, Darius, | Waltham, | " 7, | S. P. P. Fay. |
| Whitaker, Ira W. | Hardwick, | May 6, | Walter A. Bryant. |
| White, Talbot C. | Worcester, | " 29, | Isaac Davis. |
| Whitney, James J. | Fitchburg, | " 25, | Charles Mason. |
| Wicks, William H. | Watertown, | " 30, | George W. Warren. |
| Wilbur, Lockhart, | Randolph, | June 3, | Sherman Leland. |
| Willard, Charles, | Fitchburg, | " 2, | Charles Mason. |
| Woodman, Nathaniel, | Haverhill, | May 30, | James H. Duncan. |
| Young, Lucas C. | Fall River, | June 1, | C. J. Holmes. |